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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM TYSON et al., Defendants and Appellants.	C079403 (Super. Ct. Nos. SF121488A, SF121488B, SF121488C)

After entering the home of victim Anthony Holladay, defendants Dreshaujn Mitchell, Edwan Scott and William Tyson robbed and killed Holladay. Mitchell was convicted of first degree murder, first degree residential robbery, and active participation in a criminal street gang. Scott was convicted of first degree murder, first degree

residential robbery, assault with a firearm, and active participation in a criminal street gang. Tyson was convicted of first degree murder, first degree residential robbery, and assault with a firearm. The trial court sentenced Mitchell to a determinate term of nine years, plus an indeterminate term of 50 years to life, and it sentenced Scott and Tyson to determinate terms of 12 years, plus indeterminate terms of 50 years to life.

Defendants now contend (I) the magistrate erred at the preliminary hearing by finding probable cause as to the substantive gang crime and gang enhancements, thus allowing prejudicial gang evidence to be admitted at trial. In support of this contention, defendants argue (A) the expert testimony was insufficient to support the gang allegations because the expert relied on case-specific hearsay (*People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*)), (B) there was insufficient evidence of an associational and organizational connection to establish the existence of a single gang (*People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*)), (C) there was insufficient evidence that defendants were members of the same gang, and (D) there was insufficient evidence to support a finding of a gang purpose with respect to the gang enhancement. We conclude the gang evidence presented at the preliminary hearing, including the hearsay evidence presented through the gang expert, was sufficient to support the probable cause findings.

Defendants also contend (II) the trial court erred by denying defendants' motion, made after trial had started, to bifurcate the gang allegations from the other allegations for trial. We conclude the trial court properly denied the motion as untimely.

Defendants further contend (III) the trial court committed instructional error by (A) refusing a defense request to instruct on justifiable self-defense, (B) refusing a defense request to instruct on voluntary manslaughter under a heat-of-passion or imperfect-self-defense theory, and (C) failing to instruct, sua sponte, on theft as a lesser-included offense of robbery. We conclude the trial court did not commit instructional error because the evidence did not support the jury instructions defendants argue should have been given.

In addition, defendants argue (IV) the trial court erred, as to evidence of the substantive gang crime and gang enhancements, in (A) admitting evidence of Tyson's statement from a prior juvenile detention questionnaire that he was a gang member, (B) allowing the gang expert to testify about predicate offenses committed by other gang members, and (C) allowing the prosecutor to ask and the gang expert to answer two specific hypothetical questions. We conclude that, even if it was error to admit Tyson's prior statement about being a gang member, admission of the statement was harmless beyond a reasonable doubt. We also conclude the trial court did not err in admitting the remaining gang evidence and allowing the hypothetical questions.

Moreover, defendants claim (V) the evidence was (A) insufficient to sustain the substantive gang offense and gang enhancements (including (1) insufficient evidence of an associational and organizational connection among gang subsets, (2) insufficient evidence that the robbery was committed for the benefit of the gang, and (3) insufficient evidence that defendants were members of the same gang), (B) insufficient to sustain the robbery conviction, (C) insufficient to sustain the first degree murder conviction based on the two theories presented to the jury -- premeditated murder and felony murder, and (D) insufficient to sustain the personal firearm discharge enhancement under Penal Code section 12022.53, subdivision (d).[1] We conclude the evidence was sufficient as to all convictions and enhancements challenged.

Mitchell, who had a jury separate from the jury that tried defendants Scott and Tyson, contends (VI) the trial court erred by failing to investigate possible intimidation of a juror by the other jurors. We conclude the trial court did not abuse its discretion in its investigation of possible juror intimidation.

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[1] Undesignated statutory references are to the Penal Code.

Defendants contend (VII), as to sentencing, (A) the trial court erred by imposing an unstayed term for robbery, (B) the trial court's imposition of a term for robbery in concert was unauthorized, and (C) the matter must be remanded for the trial court to exercise its newly-enacted discretion concerning whether to strike firearm enhancements. We conclude the trial court did not err as to sentencing, but we will vacate the sentence as to each defendant and remand for the trial court to exercise its discretion concerning the firearm enhancements and resentence each defendant as appropriate.

Furthermore, defendants assert (VIII) the prejudice resulting from the errors cumulatively requires reversal even if the prejudice from the errors individually was harmless. Because we conclude there was no more than one error (the admission of Tyson's prior statement), there is no accumulation of prejudice to consider.

Finally, defendants claim (IX) this court must remand to the trial court for a hearing to determine whether, as to each defendant, he was afforded sufficient opportunity at sentencing to make a record of information relevant to his eventual youth offender parole hearing. We conclude that, under California Supreme Court precedent, decided after sentencing in this case, the matter must be remanded to the trial court to determine, as to each defendant, whether he was afforded a sufficient opportunity to make a record of information and, if there was not a sufficient opportunity, to afford such opportunity.

We will affirm the judgments and remand for the limited purposes described in this opinion.

BACKGROUND

The crimes took place at a home on West Flora Street in Stockton. Several people, including Holladay, the murder victim, lived in the home. Holladay shared a bedroom with his girlfriend M.C. People regularly hung out at the house and smoked marijuana. Holladay also sold marijuana, and Tyson was one of his clients. Holladay kept a loaded shotgun in his bedroom, behind a mirror.

Before the day of the murder, Tyson sold a shotgun to Z.T., a friend of Holladay. The shotgun had tape on the stock and did not load properly.

On the day of the murder, August 25, 2012, all three defendants went to the West Flora Street residence around midday. Defendants went into Holladay's room with Holladay and conversed there. During the visit, defendants bought some marijuana. After a few minutes, defendants left the residence. They took with them the taped shotgun that Tyson had sold to Z.T.

Later the same day, defendants returned to the West Flora Street residence with the taped shotgun. R.V., another resident of the West Flora Street home, was the only one home. R.V. was uncomfortable having defendants in the house, so he gave them a marijuana joint, lit it for them, escorted them out the door saying he had to leave, and locked the door. He went into the bathroom and called Holladay. Defendants stayed outside the house, knocking on the door. R.V. told Holladay that it felt like defendants were trying to rob them. About 20 minutes later, Holladay returned home with M.C. and some other friends.

When Holladay arrived, he and defendants entered the house and went into Holladay's bedroom. M.C. remained in the living room. R.V. heard a conversation between Holladay and Tyson that sounded ominous, with a darkness in Tyson's voice. R.V. then left the house.

Alone in the living room, M.C. heard, in her words, "a loud noise, like something being pushed over. Followed by sounds of a gunshot . . . ." Around the time M.C. heard the noises, Eric T., also a resident of the West Flora Street home, came in the front door. M.C. could hear Holladay trying to talk while struggling, "like when you're trying to talk and do something at that same time . . . ." She ran outside and called 911.

As Eric entered the house, he heard shouting and a loud sound coming from Holladay's room. He heard Holladay saying, "be cool, be cool," followed by a loud noise, like a dresser being slammed into a wall and a scuffle taking place. Eric ran to the

bedroom, where the door was closed. He tried to open the door, but there was resistance, so he put his shoulder into it and barreled through. Inside the room, he saw Mitchell holding a shotgun, pointed at Holladay. The shotgun was the one that Holladay kept in his bedroom. Eric saw Tyson using the taped shotgun to hold Holladay's arms down and immobilize him. Both Tyson and Holladay were standing, and Holladay was bleeding.

Eric hit Tyson, and Eric, Holladay and Tyson toppled onto the bed. Eric yanked the taped shotgun away from Tyson but realized that it was not functional.

As Eric struggled with Tyson, Scott hit Eric in the face with a handgun. Eric grabbed the barrel of Scott's handgun and grabbed Scott by the hair, pulling him down. In that process, Scott's handgun discharged. Eric remembered the handgun discharging two or three times. Meanwhile, Holladay crawled to the corner of the room. Eric and Scott fell to the floor, and Tyson kicked Eric in the head three or four times.

Holladay told Eric a few times to let go of the handgun and Scott's hair, and Eric complied. Mitchell pointed the shotgun at Eric, and then all three defendants left the room. Defendants fled through the front door, taking Holladay's shotgun. Tyson had a small gun in his hand as they left.

The other residents of the home tried to help Holladay, who had blood dripping from his shorts. In the process of helping Holladay, Eric saw a pocket knife that belonged to Holladay on the floor of the bedroom. He had not seen the knife during the altercation. The residents took Holladay outside, where they were met by police and paramedics. By that time, Holladay was unresponsive, and he later died.

Holladay was shot from a distance of about five feet. Shotgun pellets, along with the shot cup, entered Holladay's body through his scrotum, traveling upward and transecting an iliac artery. A person suffering this type of injury would be able to talk for several minutes, but would bleed to death within about 10 minutes.

On the day after the murder, Scott sent a text message from his cell phone to a person named "Eggy." The message contained a photograph of Holladay's shotgun used

in the murder. The message stated: "do you know somebody trying to trade this for too little hand things"? "Too little hand things" referred to handguns.

Police searched Mitchell's residence and found a nine-millimeter firearm in his bedroom. Forensic testing revealed that casings found in the West Flora Street home were shot from that nine-millimeter firearm.

Mitchell was treated for two stab wounds on the day after the murder: wounds to the chest and posterior thigh.

A criminalist collected bodily fluid, including some blood, from an unknown part of Holladay's pocket knife found on the floor of Holladay's bedroom after the murder. DNA analysis of the bodily fluid showed that it was a mixture from at least two individuals. Holladay was included as a major contributor, and Mitchell could not be excluded as a minor contributor.

Two juries were used to try defendants: one jury for defendants Scott and Tyson, and the other for Mitchell. To the jury for Mitchell only, the prosecution presented a statement made by Mitchell in the emergency room to an officer when Mitchell was being treated for the stab wounds. Mitchell said he was walking on the street when he got into a fight with a transient and was stabbed.

Additional evidence, including gang-related evidence, is recounted later as relevant to the analysis of defendants' contentions.

The jury for Mitchell's case convicted Mitchell of (1) first degree murder of Holladay (§ 187, subd. (a) -- count one), (2) first degree residential robbery of Holladay (§ 211 -- count two), and (3) active participation in a criminal street gang (§ 186.22, subd. (a) -- count four). As to the murder and robbery counts, the jury made additional findings that Mitchell (a) personally used a firearm (§ 12022.53, subd. (b)), (b) intentionally and personally discharged a firearm (§ 12022.53, subd. (c)), (c) intentionally and personally discharged a firearm proximately causing great bodily injury or death (§ 12022.53, subd. (d)), (d) participated in a crime as a principal in which

a principal intentionally and personally discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (d) & (e)(1)), (e) personally used a firearm in the commission of a felony (§ 12022.5, subd. (a)), and (f) committed a crime in which a principal was armed with a firearm (§ 12022, subd. (a)(1)). As to the robbery count, the jury also found Mitchell committed the crime for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).)

Mitchell's jury was unable to reach a verdict on count three which charged assault with a firearm on Eric (§ 245, subd. (a)(2).) The jury was also unable to reach a unanimous finding on whether Mitchell committed the murder for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) The trial court declared a mistrial on count three and the criminal street gang allegation associated with the murder count; count three and the criminal street gang allegation associated with the murder count were dismissed.

The jury for Scott and Tyson convicted Scott of (1) first degree murder of Holladay (§ 187, subd. (a) -- count one), (2) first degree residential robbery of Holladay (§ 211 -- count two), (3) assault with a firearm on Eric (§ 245, subd. (a)(2) -- count three), and (4) active participation in a criminal street gang (§ 186.22, subd. (a) -- count four). As to the murder and robbery counts, the jury made findings that Scott (a) participated in a crime as a principal in which a principal intentionally and personally discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (d) & (e)(1)), (b) participated in a crime in which a principal was armed with a firearm (§ 12022, subd. (a)(1)), and (c) committed the crime for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). As to the assault with a firearm count, the jury found Scott (a) participated in a crime in which a principal was armed with a firearm (§ 12022, subd. (a)(1)) and (b) committed the crime for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)).

As for Tyson, during the trial and at the prosecution's request, the trial court dismissed count four charging Tyson with active participation in a criminal street gang. (§ 186.22, subd. (a).) The jury convicted Tyson of (1) first degree murder of Holladay (§ 187, subd. (a) -- count one), (2) first degree residential robbery of Holladay (§ 211 -- count two), and (3) assault with a firearm on Eric (§ 245, subd. (a)(2) -- count three). Regarding the murder and robbery counts, the jury made findings that Tyson (a) personally used a firearm (§ 12022.53, subd. (b)), (b) participated in a crime as a principal in which a principal intentionally and personally discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (d) & (e)(1)), (c) personally used a firearm in the commission of a felony (§ 12022.5, subd. (a)); (d) participated in a crime in which a principal was armed with a firearm (§ 12022, subd. (a)(1)), and (e) committed the crime for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). Also as to the murder and robbery counts, the jury found not true the allegation that Tyson intentionally and personally discharged a firearm. (§ 12022.53, subd. (c).) On the assault with a firearm count, the jury found Tyson (a) participated in a crime in which a principal was armed with a firearm (§ 12022, subd. (a)(1)), (b) personally used a firearm in the commission of a felony (§ 12022.5, subd. (a)), and (c) committed the crime for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)).

The trial court sentenced Mitchell to a determinate upper term of nine years for first degree robbery and an indeterminate term of 25 years to life for first degree murder, plus a term of 25 years to life for discharge of a firearm causing great bodily injury or death. The trial court imposed but stayed terms for active participation in a criminal street gang and the remaining enhancement allegations. The total term imposed for Mitchell was a determinate term of nine years, plus an indeterminate term of 50 years to life.

The trial court sentenced Scott to a determinate upper term of nine years for first degree robbery, a determinate middle term of three years for assault with a firearm, an

indeterminate term of 25 years to life for first degree murder, plus an indeterminate term of 25 years to life for discharge of a firearm causing great bodily injury or death. The trial court imposed but stayed terms for active participation in a criminal street gang and the remaining enhancement allegations. The total term imposed was a determinate term of 12 years, plus an indeterminate term of 50 years to life.

The trial court sentenced Tyson to a determinate upper term of nine years for first degree robbery, a determinate middle term of three years for assault with a firearm, an indeterminate term of 25 years to life for first degree murder, plus an indeterminate term of 25 years to life for discharge of a firearm causing great bodily injury or death. The trial court imposed but stayed terms for the remaining enhancement allegations. The total term imposed was a determinate term of 12 years, plus an indeterminate term of 50 years to life.

DISCUSSION

I

After a preliminary hearing in which a magistrate found probable cause that defendants committed the crimes and enhancements, defendants moved to dismiss the gang allegations along with other charges and enhancement allegations. (§ 995.) The trial court denied the motion and defendants now challenge that ruling. They contend there was insufficient evidence at the preliminary hearing to support the substantive gang crime count and the gang enhancement allegations. They claim that the asserted error in denying the motion to dismiss the gang allegations resulted in admission of prejudicial gang evidence at trial because the evidence likely clouded the jurors' judgment of the entire case. Tyson also argues the evidence at the preliminary hearing was insufficient to support a firearm enhancement.

"[S]ection 995 allows a defendant to challenge an information based on the sufficiency of the record made before the magistrate at the preliminary hearing. [Citation.] In reviewing the denial of a . . . section 995 motion to set aside an

information, we 'in effect disregard[] the ruling of the superior court and directly review[] the determination of the magistrate holding the defendant to answer.' [Citations.]" (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1071-1072.) With respect to the evidence, "we must draw all reasonable inferences in favor of the information [citations] and decide whether there is probable cause to hold the defendants to answer, i.e., whether the evidence is such that 'a reasonable person could harbor a strong suspicion of the defendant's guilt.' [Citations.]" (*Id*. at p. 1072.) " ' "An information will not be set aside . . . if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it." ' [Citation.]" (*People v. Arjon* (2004) 119 Cal.App.4th 185, 193, italics omitted.)

If we find there is insufficient evidence to support the probable cause determination, we do not reverse unless the defendant can show that the error at the preliminary hearing stage deprived him of a fair trial or otherwise caused him to suffer prejudice at trial. (*People v. Seaton* (2001) 26 Cal.4th 598, 646; *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529.)

Most of the preliminary hearing testimony relevant to defendants' contentions came from Sergeant Mark Couvillion, an expert on African American gangs in Stockton. He testified that he was familiar with a gang known as Bloods operating in the Stockton area and elsewhere in California. He participated in more than 100 investigations of crimes committed by Bloods gang members and was familiar with specific areas in Stockton where Bloods gang members operate. In Sergeant Couvillion's expert opinion, the Bloods gang is an ongoing association of three or more persons sharing a common name or common identifying sign or symbol. Ten Bloods gang members (Sergeant Couvillion referred to them as "straight Bloods") had been documented, with an additional eight associates.

Sergeant Couvillion testified that there are subsets of the Bloods gang in Stockton, including Westside Bloods and Original Bloods. Bloods gang members may also

identify themselves as Piru or Louis Park. The Westside Bloods congregate in the Pixie Woods area, but gang members tend to be mobile. Westside Bloods and Original Bloods were all one gang. Westside Bloods, Original Bloods, and the Bloods gang were documented as being connected in Stockton. Westside Bloods, Original Bloods, and the Bloods gang were documented as being connected in Stockton because they work together to transport drugs and guns and share contact information.

Sergeant Couvillion identified some of the primary activities of Bloods gang members as murder, attempted murder, robbery, auto theft, burglary, narcotics sales, possession of guns, sale of guns, and home invasions. Anthony Copeland, a Westside Bloods member, had convictions for burglary, possession of firearms, and possession of drugs. Chamnan Sath, an Original Bloods member, had convictions for robbery and gang participation.

Sergeant Couvillion was aware of tagging in the Stockton area consistent with both Bloods and Westside Bloods. Some of the graffiti was identified as Westside Bloods graffiti, and it included words in which a "k" was substituted for a crossed-out "c," which is a tactic Bloods use to show disrespect for Crips gang members. Also, "Blood" and "Westside" is written in red because Bloods associate themselves with the color red.

Sergeant Couvillion testified concerning Mitchell's gang membership. He mentioned a prior incident in which Mitchell was with a Westside Bloods or Original Bloods gang member, and Mitchell assaulted and threatened to kill a third person who had shown disrespect for Bloods. Mitchell yelled, "This is Westside territory." Mitchell had family members who were Westside Bloods or Bloods gang members, and he was known by the moniker "Little Blood." He claimed to have created graffiti associated with Bloods gang membership in which the "c" was replaced with a "k." Based on this and additional information, Sergeant Couvillion was of the opinion Mitchell was an active Bloods gang member.

Sergeant Couvillion also testified concerning Tyson's gang membership. In a juvenile hall booking in 2007 -- five years before the crimes in this case -- Tyson admitted his gang membership. Tyson associated with gang members and dealt in firearms.

In addition, Sergeant Couvillion testified regarding Scott's gang membership. Review of postings on social media revealed that Scott appeared to, in Sergeant Couvillion's words, "represent an area of a park that's known for gangs in a different city." Photographs of Scott included gang signs, tattoos, and words written with numbers. The tattoos indicated an Oakland park, Sobrante, known for violent gangs. Sergeant Couvillion had not received confirmation of whether the Sobrante gang was a Bloods gang or a Crips gang. This case was the first time Sergeant Couvillion had noted a connection between the Westside Bloods and the Sobrante Park gang.

The prosecutor presented the following hypothetical to Sergeant Couvillion:

"If three individuals, one who has gang-related writings, has admitted gang admission, has admitted gang membership, another individual that contains tattoos upon their . . . person that indicate an association or relation to a gang, as well as another individual that has admitted membership get together, arm themselves with firearms, go over to a location, and once inside pull out those firearms for an attempt to commit a robbery to take the drugs, that they pull guns out; as a result of that, there's a response by the victim -- an ensuing struggle and the victim is shot; those three subjects leave the scene of the homicide together and are later apprehended separately; one of those individuals is found in possession of a firearm believed to be used during the course of the events, and another possesses a photograph of themselves posing with a firearm that is believed to have been taken during that course of that robbery; do you have an opinion as to whether or not those crimes, if any, were committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, instigate or encourage criminal activities of a gang?"

Sergeant Couvillion answered: "The opinion is that you have gang members willing to go with each other to commit a crime, a violent crime, armed with guns for the purpose of committing robbery. Knowing those gang members are going to profit from the robbery benefits them and the gang. The gang benefits off the reputation. They benefit off the money that they obtain from this robbery. Through that, they're able to buy and sell more drugs or firearms with the money they've obtained. When their reputation goes up, it again creates a fear in the community. Word spreads amongst gangsters in their world and they will be known for having committed this crime and their status will be raised as a result of committing this crime." Sergeant Couvillion clarified that, in his opinion, all three defendants were actively participating in the Bloods criminal street gang on the date of the crimes in this case.

Section 186.22, the Street Terrorism Enforcement and Prevention Act (the STEP Act), includes a substantive gang offense under subdivision (a), as well as gang enhancement provisions under subdivision (b). Under section 186.22, subdivision (a), the substantive crime is committed by any "person who actively participates in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang . . . ." (§ 186.22, subd. (a).) Therefore, the elements of the substantive gang offense are " [1] active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; [2] knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and [3] the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang." (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130 (*Rodriguez*).)

Before we further discuss the elements of the substantive gang offense, we consider an evidentiary issue raised by defendants with respect to both the substantive gang offense and the gang enhancements. They contend the evidence at the preliminary

hearing was insufficient to establish probable cause because the magistrate's probable cause finding relied on case-specific hearsay in violation of defendants' confrontation rights.

A

As part of his expert testimony at the preliminary hearing, Sergeant Couvillion related statements from police reports to support the gang allegations against defendants. For example, Sergeant Couvillion related an incident recorded in a police report in which Mitchell threatened to kill a victim of a burglary and claimed they were in "Westside territory." The sergeant used this and other hearsay statements from police reports to support his conclusions concerning the gang allegations.

Defendants contend Sergeant Couvillion's preliminary hearing testimony was insufficient to support the gang allegations because the testimony relied on case-specific testimonial hearsay, which also violated their confrontation rights. For this contention, they rely on authority that case-specific hearsay may not be used to establish gang membership. (See *Sanchez, supra*, 63 Cal.4th 665.) This contention fails because Sergeant Couvillion, as a law enforcement officer with more than five years of experience, was allowed to relate, and the magistrate was allowed to rely on, hearsay statements at the preliminary hearing. (Cal. Const. art. I, § 30, subd. (b); § 872, subd. (b).) Furthermore, defendants made no confrontation clause objection to the evidence during the preliminary hearing. Any confrontation clause issue relating to the preliminary hearing is therefore forfeited (*In re Seaton* (2004) 34 Cal.4th 193, 198), and, in any event, the right to confrontation, which is a trial right, does not apply to preliminary hearings. (*Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1078.)

Having decided this evidentiary issue, we turn to the elements of the substantive gang offense.

B

Concerning the second element of the substantive gang offense, defendants contend the evidence did not establish probable cause for a pattern of activity by a single criminal street gang. Section 186.22, subdivision (f) defines "criminal street gang" as "any 'ongoing organization, association, or group of three or more persons' that shares a common name or common identifying symbol; that has as one of its 'primary activities' the commission of certain enumerated offenses; and 'whose members individually or collectively' have committed or attempted to commit certain predicate offenses." (*Prunty, supra,* 62 Cal.4th at p. 67.)

" '[W]here the prosecution's case positing the existence of a single "criminal street gang" for purposes of section 186.22[, subdivision] (f) turns on the existence and conduct of one or more gang subsets, then the prosecution must show some associational or organizational connection uniting those subsets.' (*Prunty, supra,* 62 Cal.4th at p. 71.) 'Whatever theory the prosecution chooses to demonstrate that a relationship exists, the evidence must show that it is the same "group" that meets the definition of section 186.22[, subdivision] (f) -- i.e., that the group committed the predicate offenses and engaged in criminal primary activities -- and that the defendant sought to benefit under section 186.22[, subdivision] (b). But it is not enough . . . that the group simply shares a common name, common identifying symbols, and a common enemy. Nor is it permissible for the prosecution to introduce evidence of different subsets' conduct to satisfy the primary activities and predicate offense requirements without demonstrating that those subsets are somehow connected to each other or another larger group.' ([*Prunty,*] at p. 72, fn. omitted.)" (*People v. Ramirez* (2016) 244 Cal.App.4th 800, 814 (*Ramirez*).)

Contrary to defendants' argument on appeal, Sergeant Couvillion testified at the preliminary hearing about the connection between the Westside Bloods subset, the Original Bloods subset, and the Bloods gang. There was evidence that Westside Bloods

and Original Bloods are subsets of the Bloods gang in Stockton, that Westside Bloods and Original Bloods were all one gang, and that Westside Bloods, Original Bloods, and the Bloods gang were documented as being connected in Stockton because they work together to transport drugs and guns and share contact information. Sergeant Couvillion testified that Anthony Copeland, a Westside Bloods member, had convictions for burglary, possession of firearms, and possession of drugs, and Chamnan Sath, an Original Bloods member, had convictions for robbery and gang participation. There was sufficient evidence to establish probable cause that the Bloods gang and its Stockton subsets were in the same "group" under section 186.22, subdivision (f), to support a finding of a pattern of criminal gang activity by the connected gangs and subsets under section 186.22, subdivision (e).

C

Concerning the third element of the substantive gang offense, defendants contend the evidence at the preliminary hearing did not establish probable cause that two or more members of a gang committed felonious criminal conduct.

"[T]o satisfy the third element [of the substantive gang offense], a defendant must willfully advance, encourage, contribute to, or help members of his gang commit felonious criminal conduct. The plain meaning of section 186.22[, subdivision] (a) requires that felonious criminal conduct be committed by at least two gang members, one of whom can include the defendant if he is a gang member. (See § 186.22, subd. (i).)" (*Rodriguez, supra,* 55 Cal.4th at p. 1132, italics omitted.) The two gang members must be members of the same gang. (*People v. Velasco* (2015) 235 Cal.App.4th 66, 78 (*Velasco*).)

Here, there was sufficient evidence establishing probable cause that Mitchell and Tyson were members of the same gang. Mitchell was a Westside Bloods gang member. Tyson knew Mitchell as "Little Blood" and Tyson engaged in marijuana and firearm transactions which are among the primary activities of the Westside Bloods gang. A

witness in the house at the time of the crimes described Tyson as wearing a red baseball hat with a W on the front. Because (1) Bloods identify with the color red, (2) the W for Westside Bloods was on the hat, (3) Tyson was engaged in a primary activity of the Westside Bloods gang, and (4) Tyson had admitted gang membership five years earlier, it can reasonably be inferred, in support of a probable cause finding, that Tyson was a Westside Bloods gang member. Thus, the preliminary hearing testimony established probable cause that two or more members of the same gang committed felonious conduct together.

D

The gang enhancement applies when an offense is committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b).) The enhancement does not require active participation in a gang. (*In re Ramon T.* (1997) 57 Cal.App.4th 201, 207.)

Defendants contend the evidence at the preliminary hearing was insufficient to establish probable cause as to the gang enhancements. We need not repeat our consideration of issues that apply to both the substantive gang offense and the gang enhancement, such as the definition of a criminal street gang. Instead, we consider here a contention that relates only to the gang enhancement. Defendants argue there was insufficient evidence to establish probable cause that the charged crimes were committed for a gang purpose. As noted above, primary activities of the Blood gang, with its subsets Westside Bloods and Original Bloods, included firearms transactions, robberies, and violence. The evidence at the preliminary hearing established probable cause that defendants were involved in a firearm transaction and committed a violent robbery. Therefore, the crimes benefitted the gang in two ways, by obtaining money for the gang and by enhancing the gang's reputation for violence. That was sufficient to establish probable cause of a gang purpose.

Defendants claim the prosecutor's hypothetical posed to Sergeant Couvillion regarding a gang purpose was flawed because it did not conform to the evidence presented at the preliminary hearing. We need not parse the hypothetical for factual accuracy because the magistrate was the finder of fact and the magistrate had sufficient evidence, independent of the hypothetical posed to Sergeant Couvillion, to establish probable cause.

II

After jury trial had begun, defendants filed a motion to bifurcate the gang allegations from the other allegations for trial. The jury panel had already been informed of the gang allegations, but Mitchell offered to "[waive] any irregularities as to what they've heard already about gangs." The trial court denied the motion both as untimely, because the jury had been notified of the gang allegations, and on the merits.

Defendants now contend the trial court's denial of their motion to bifurcate was prejudicial error. They argue the evidence of robbery was weak and the gang evidence may have convinced the jury to rely on an improper inference of a criminal disposition, overcoming doubts about guilt.

A trial court has discretion to bifurcate trial of gang allegations from trial of the remaining allegations. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049-1050; *People v. Franklin* (2016) 248 Cal.App.4th 938, 952 (*Franklin*).) Gang evidence may be probative during a trial of substantive offenses because "[e]vidence of the defendant's gang affiliation -- including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like -- can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*Hernandez,* at p. 1049.) Bifurcation may be appropriate, however, if the gang evidence is "so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*Ibid.*) The defendant bears the burden " 'to

clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' " (*Id.* at p. 1051.) We review the trial court's bifurcation decision for abuse of discretion. (*Franklin,* at p. 952.)

Defendants argue the trial court was mistaken in finding the motion to bifurcate untimely because the defense offered to waive any prejudice resulting from the jury's knowing about the gang allegations. However, defendants offer no authority for the propositions that their motion was timely or that the offer to waive any prejudice overcame the timeliness problem. Having failed to offer any authority, defendants have forfeited the argument. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; see also Cal. Rules of Court, rule 8.204(a)(1)(B) [appellant must support each point with authority].) Because defendants waited until after the jury trial had begun and after the jury panel had been informed of the gang allegations before seeking bifurcation, the motion was untimely and the trial court did not abuse its discretion in denying the motion. (See *People v. Calderon* (1994) 9 Cal.4th 69, 77-78 [improper denial of *timely* motion to bifurcate an abuse of discretion].)

III

Defendants next contend the trial court erred in several ways when instructing the jury.

The trial court must instruct the jury on general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case, even in the absence of a request. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) Moreover, "[r]equested instructions on a defense must be given if they are supported by substantial evidence, rather than 'minimal and insubstantial' evidence. (*People v. Flannel* (1979) 25 Cal.3d 668, 684.) Evidence is substantial if a reasonable jury could find the existence of the particular facts underlying the instruction. If the evidence is substantial, the trial court is not permitted to determine the credibility of witnesses, which is a task for the jury. [Citations.]" (*People v. Lee* (2005) 131

Cal.App.4th 1413, 1426.) "In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.' " (*People v. Salas* (2006) 37 Cal.4th 967, 982-983.)

A

Defendants assert the trial court erred by refusing to instruct the jury on justifiable self-defense. They argue there was evidence Mitchell shot Holladay after Holladay stabbed him.

After the evidence was presented at trial, Mitchell requested a self-defense instruction based on CALCRIM No. 505, which identifies justifiable homicide as a killing in which the defendant (1) reasonably believed he or someone else was in imminent danger of being killed or seriously injured, (2) reasonably believed immediate use of deadly force was necessary, and (3) used no more force than reasonably necessary. However, an initial aggressor may not invoke the doctrine of self-defense if the victim fights back in self-defense. (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1.)

The trial court denied the request for the instruction, reasoning "there is virtually no evidence supporting the concepts of self-defense or justifiable homicide in this case. . . . [T]he Court has no doubts in its assessment of the evidence and testimony . . . ."

There was no witness that testified to facts amounting to self-defense; instead, defendants seek to draw inferences supporting such a scenario. Mitchell argues: "The jury heard evidence that a struggle in the victim's bedroom resulted in the victim receiving a fatal gunshot wound and [Mitchell] receiving nonfatal stab wounds. An eyewitness saw [Mitchell] pointing a shotgun at the victim very soon after the fatal shot. DNA analysis determined that both [Mitchell's] blood and the victim's blood were on the victim's knife which was found in the room by police. This evidence suggested that [Mitchell] fired the fatal shot and the victim stabbed [Mitchell], but no evidence

established with any certainty which person first brandished a deadly weapon at the other person."

However, when a police officer visited with Mitchell at the emergency room, Mitchell did not say he sustained his wounds in defending himself against Holladay; instead, Mitchell said he sustained his wounds in a fight with a transient. No testifying witness saw a knife in Holladay's hands. Eric testified that the pocket knife belonged to Holladay, but just before Eric heard a loud sound, he heard Holladay saying, "be cool, be cool." Eric entered the room soon after the shotgun blast. He saw Holladay's shotgun in Mitchell's hands, but he did not see a knife in Holladay's hands. Eric saw the knife on the floor after defendants left the room. During the moments after Eric entered the room, there was a brawl involving Holladay (who had already been shot), Eric, and defendants. The bodily fluid of both Mitchell and Holladay were on the knife, but there were no identifiable fingerprints. The fact that the knife had Mitchell's bodily fluid on it supports a reasonable inference that Mitchell's wounds were caused by the knife, but the fact that the knife had Holladay's bodily fluid on it reasonably supports only an inference that Holladay and the knife were in the same area while Holladay was bleeding profusely, which would have occurred after he was shot. In other words, while the evidence reasonably supported an inference that Mitchell shot Holladay before Eric entered the room, the evidence does not support a reasonable inference that the reason Mitchell shot Holladay was that Holladay was threatening or stabbing Mitchell with the knife. It is also unreasonable to infer that Holladay was threatening or stabbing Mitchell with the knife while saying, "be cool, be cool." The remaining circumstances also do not support a reasonable inference Mitchell shot Holladay in self-defense. Defendants came in a group to see Holladay. They were armed. After the shooting, defendants fled and tried to cover up their involvement. There is no reasonable inference that Mitchell shot Holladay in self-defense, and speculation about self-defense does not support a justifiable homicide instruction.

The trial court correctly determined the evidence did not support a reasonable inference that the killing of Holladay was justifiable homicide and properly did not instruct the jury on that legal principle.

B

Employing similar reasoning, defendants contend the trial court erred by refusing to instruct the jury on voluntary manslaughter, under a heat of passion theory and an imperfect self-defense theory. For the same reasons, this contention is without merit.

Defendants requested voluntary manslaughter jury instructions on heat of passion (CALCRIM No. 570) and imperfect self-defense (CALCRIM No. 571). The trial court denied the request because the evidence did not support the instructions.

A defendant who commits an intentional and unlawful killing, but who lacks malice, is guilty of voluntary manslaughter. (§ 192.) In limited, explicitly defined circumstances -- the defendant acts in a sudden quarrel or heat of passion, or when the defendant kills in imperfect self-defense -- this conduct reduces an intentional, unlawful killing from murder to voluntary manslaughter. Voluntary manslaughter of these two forms is a lesser included offense of intentional murder. (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) The trial court has an obligation to give instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present, but not when there is no evidence that the offense was less than that charged. (*Id*. at pp. 154-155.)

Sudden quarrel or heat of passion voluntary manslaughter has both an objective and a subjective component. (*People v. Moye* (2009) 47 Cal.4th 537, 549.) To satisfy the objective or reasonable person element of this form of voluntary manslaughter, the accused's heat of passion must be due to sufficient provocation, either caused by the victim or by conduct reasonably believed by the defendant to have been engaged in by the victim. (*Id*. at pp. 549-550.) To satisfy the subjective element of voluntary

manslaughter, the accused must be shown to have killed while under the actual influence of a strong passion induced by such provocation. (*Id*. at p. 550.)

"Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.' [Citations.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201.) As explained in *People v. Beltran* (2013) 56 Cal.4th 935, 949: "The proper focus is placed on the defendant's state of mind, not on his particular act. To be adequate, the provocation must be one that would cause an emotion so intense that an ordinary person would simply react, without reflection . . . . [T]he anger or other passion must be so strong that the defendant's reaction bypassed his thought process to such an extent that judgment could not and did not intervene. Framed another way, provocation is not evaluated by whether the average person would act in a certain way: to kill. Instead, the question is whether the average person would react in a certain way: with his reason and judgment obscured." (Italics omitted.)

Here, there was no evidence to support a heat-of-passion voluntary manslaughter instruction. Right before Mitchell shot Holladay, Eric heard Holladay saying, "be cool, be cool." Nothing that Eric saw when he entered the room would lead one to believe Holladay provoked Mitchell. There was also no evidence to suggest that any provocation was sufficient to cause an average person to shoot. Except for Holladay pleading with someone to "be cool," we, and the jury, can only speculate as to what happened just before Mitchell fired the fatal shot. The fact that Mitchell ended up at the hospital later that day with stab wounds simply does not lead to a reasonable inference concerning what happened in that room before Eric entered.

Mitchell suggests a scenario that he believes supported a voluntary manslaughter instruction. He reasons: "[T]he jury heard evidence that suggested that [Mitchell] shot the victim and the victim stabbed [Mitchell], although no evidence disclosed with any

certainty which act preceded the other. However, the jury could have inferred from this evidence that [Mitchell] fired the fatal shot with the victim's shotgun only in response to the victim's violent act of attacking [Mitchell] or stabbing him with the knife." This reasoning fails because no evidence supported a reasonable inference that Holladay stabbed Mitchell before Mitchell shot Holladay. Instead, the evidence suggested Holladay did not stab Mitchell before the shooting because Holladay was begging Mitchell to "be cool."

Scott claims there is more certainty about what happened in the room before Mitchell shot Holladay. He says it is "undoubtedly true" that Mitchell had been stabbed before Eric entered the room. But the only evidence he cites for this assertion is that Mitchell went to the hospital within hours of the crimes. Contrary to Scott's assertion, only speculation supports a conclusion as to what happened before Mitchell shot Holladay.

The same is true concerning facts that might support an imperfect self-defense instruction. There was insufficient evidence to support an instruction.

"A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because [he] acted in (imperfect self-defense . . .). [¶] . . . [¶] The defendant acted in imperfect self-defense if: [¶] 1. the defendant actually believed that [he] was in imminent danger of being killed or suffering great bodily injury; [¶] AND [¶] 2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger; [¶] BUT [¶] 3. At least one of those beliefs was unreasonable." (CALCRIM No. 571.)

Because there is almost no evidence of what happened in the room before Mitchell shot Holladay, there is insufficient evidence to determine (1) whether Mitchell believed he was in imminent danger or (2) whether he believed deadly force was necessary or (3) whether any belief Mitchell actually held was reasonable. No reasonable inference

supported by actual evidence rather than speculation supported an imperfect self-defense instruction.

C

Defendants contend the trial court erred by not instructing the jury, sua sponte, on theft as a lesser-included offense of robbery. They suggest the evidence supports a theory that they formed the intent to take the shotgun only after force was applied -- after Mitchell shot Holladay.

"Theft is a lesser included offense of robbery, which includes the additional element of force or fear." (*People v. Melton* (1988) 44 Cal.3d 713, 746.) The trial court has the duty to instruct on all lesser included offenses that are supported by the evidence. (*Breverman, supra,* 19 Cal.4th at pp. 148-149.)

Mitchell argues: "No evidence suggested that [Mitchell] intended to steal Holladay's shotgun before Holladay suffered a fatal gunshot wound. The evidence showed only that [Mitchell] or a codefendant shot and killed Holladay, possibly with Holladay's own shotgun, and they took the shotgun when they left the scene of the shooting. The evidence about [Mitchell's] stab wounds and Holladay's bloody knife suggested that the stabbing may have led to an unplanned shooting of Holladay and an unplanned taking of his shotgun. Thus the jury could have concluded that [Mitchell] formed the intent to steal the gun only after Holladay was shot."

The arguments lack merit because when Eric entered the room after Mitchell shot Holladay, Holladay was still alive, and Mitchell was still aiming the shotgun at Holladay. In the ensuing struggle, Mitchell maintained possession of the shotgun, and, ultimately, defendants left with the shotgun. These are facts supporting robbery, not mere theft. (See *People v. Fierro* (1991) 1 Cal.4th 173, 226 [robbery continues during escape].) There is no factually supported theory on which the jury could have found theft, but not robbery.

IV

This part of the discussion relates to the substantive gang offenses and gang enhancements. Before considering the contentions, we summarize the gang evidence presented at trial.

Stockton Police Sergeant Mark Couvillion testified at trial as an expert on African-American gangs in the Stockton area. The Bloods gang has several subsets in Stockton. They identify with the color red, and they are rivals to Crips. Bloods gang members go by "Original Bloods," "West Side Bloods," and "Bloods." Bloods is an umbrella terminology. Sergeant Couvillion said that in Stockton, about 90 gang members are West Side Bloods or Original Bloods, but an additional 10 Bloods could not be identified with either West Side Bloods or Original Bloods.

In their writing, Bloods gang members substitute "ck" for "c" when they are writing to show disrespect for Crips, also to indicate that they are Crip Killers. Bloods gang members make a hand sign of the letter "B." West Side Bloods make a hand sign of the letter "W." According to Sergeant Couvillion, Original Bloods and West Side Bloods are the same gang in Stockton.

Sergeant Couvillion testified that guns play a significant role in gang culture as a sign of power. It is difficult to get witnesses to cooperate in gang-related investigations because the witnesses want to protect gang members or fear retaliation because gang members threaten them in various ways. He added that gang members from the Bay Area often bring their gang activity to Stockton. Bloods gang members sometimes wear red bandanas to conceal their identity. They also wear red hats and make Bloods hand signs.

In further testimony, Sergeant Couvillion said respect is important to gang members. They gain respect by having money, having guns, participating in gang crimes, and instilling fear in other gangs and nongang members.

According to Sergeant Couvillion, the City of Stockton uses several criteria to identify gang members. If the person meets two of the criteria, that person is documented as a gang member of a particular gang. If only one criterion applies, that person may be documented as an associate of the gang. The criteria include self-identification as a gang member, tattoos showing gang membership, clothing associated with the gang, being named as a gang member in writings and images, being identified as a gang member in law enforcement documents, participation in gang-related criminal incidents, being named as a gang member by a fellow or rival gang member, being named as a gang member by an informant, and being in the company of another member of the same gang. If a person is documented as a gang member but has not met any of the criteria for five years, that person's name is purged as a documented gang member.

Sergeant Couvillion said primary activities of the Bloods gang include murder, drive-by shootings, weapon offenses, burglary, auto theft, drug sales, and robberies. Anthony Copeland was a West Side Bloods and Bloods gang member who was convicted of burglary, conspiracy to commit a crime, and transporting a firearm and controlled substances, all committed in February 2010. Chamnan Sath was an Original Bloods member. He was convicted of robbery with gang enhancements.

The locations Pixie Woods and Louis Park are in Bloods territory, according to Sergeant Couvillion. Bloods representing the West Side or calling themselves "Woop Team" make a "W" with their hands.

The prosecutor posed a hypothetical question to Sergeant Couvillion concerning whether certain activities would be sufficient for the Stockton Police Department to document someone as a gang member. The hypothetical asked: "[I]f three individuals were to get together, . . . wear the color red, go together to an area, commit a crime together, would that be enough to document all of those individuals as criminal street gang members of a particular set?" The prosecutor added to the hypothetical that at least

one of the participants was wearing gang attire. Sergeant Couvillion responded affirmatively.

Before the day of the homicide, none of the current defendants had been documented by law enforcement as Bloods gang members. Sergeant Couvillion testified that Tyson wrote in a juvenile hall questionnaire about five years before the homicide in this case that he was a gang member. Sergeant Couvillion also testified that, on August 4, 2012, several weeks before the homicide, Mitchell tried to intimidate a person. Someone in the group that Mitchell was with said: "This is West Side, this is our area, you need to watch yourself."

Tyson engaged in dealing a firearm -- the taped shotgun. In addition, on the day of the homicide, Tyson wore a red hat with a "W" on it. Mitchell wore a red hat with "A's" on it.

In a search of Mitchell's residence, officers found a nine-millimeter handgun with an extended clip in a bedroom. In the same room as the handgun, they found "WS" and "Woop Blood" written in red and black on the inside of a television stand or armoire that also had Mitchell's personal papers in it. "WS" refers to Westside Bloods, and "Woop" is a common name for Bloods. Casings from the test firing of the nine-millimeter handgun found in Mitchell's room matched the casings found in the West Flora Street home on the day of the homicide. Mitchell's Facebook account had indications of gang membership, including references to "Dre Woop Team Offickial Blood," references to other "Bloods," using the word "woop," and using "ck" in place of "c."

Investigators obtained defendants' cell phones. Texts sent to and received on Scott's cell phone and Mitchell's cell phone contained intentionally misspelled words, substituting "c" with "ck." Scott's cell phone contained a contact called "Dre Blood" associated with Mitchell's phone number. And Mitchell referred to himself as "Dre Blood." Images on Mitchell's cell phone included people making a "W" hand sign.

Scott's cell phone also contained a contact called "Bald Head Tyson" associated with Tyson's cell phone. On the day after the homicide, Tyson sent a text message to Scott, writing, "Blood bring that now nigga jap n keyona on theyvway." Images on Scott's cell phone included a picture of Scott making a "W" hand sign associated with West Side Bloods. Scott's Facebook page included a picture of him with the word "Sobrante" tattooed on his forearm. Sobrante Park is a neighborhood in Oakland with a gang, and criminal activity is associated with Sobrante. Another picture from the Facebook page showed a red tattoo with the number 11500, which is a provision of the Health and Safety Code associated with drug sales. The Sobrante Park gang is known for drug dealing, murders, auto theft, drive-by shootings, and weapons offenses. Sobrante is not a Crips or Bloods gang.

Also on the day after the homicide, Scott sent a picture of the shotgun taken from Holladay, accompanied by the text, "do you know somebody trying to trade this for too little hand things[?]" "Too little hand things" referred to two handguns. In a text to Mitchell on August 30, 2012, five days after the homicide, Scott wrote: "Ma brother got tha hammer n he out west so get that he tryna win on bloods buh wen yhuu get that can I rock with yo gauge." "Hammer" is slang for firearm, and "gauge" is slang for shotgun. Also on Scott's cell phone was a picture of Scott making "W" hand signs associated with West Side Bloods.

Sergeant Couvillion testified that hand signs by Mitchell as seen in a picture represented West Side Bloods. Several West Side Bloods gang members, some of whom were influential within the gang, visited Mitchell while he was incarcerated.

In Sergeant Couvillion's opinion, the crimes committed on August 25, 2012, the date of the murder, were gang-related because (1) the robbery was for profit, (2) it went bad and resulted in a homicide, (3) defendants had claimed gang membership through writings and practices, and (4) defendants referred to each other in the manner gang members refer to each other.

The prosecution presented Sergeant Couvillion another hypothetical, as follows:

"[I]f three individuals, . . . two of which had previously identified themselves associated with some criminal street gangs, connect themselves with a third individual; [¶] Two of those individuals go to a location with firearms; [¶] Two of those . . . individuals are wearing red hats; [¶] And they go into the location, ultimately shooting and killing an individual; [¶] Do you take all of those factors into consideration associated with gang-related terminology, gang-related material possession, and gang-related . . . identities, a name associated with them to a gang, do you base an opinion upon those facts as to whether or not that crime would have been completed for the benefit of, at the direction of, or in association with a criminal street gang for the specific purpose of promoting, instigating and furthering criminal conduct by gang members?" Sergeant Couvillion responded, "Yes."

In redirect examination, the prosecutor once again posed a hypothetical question: "[On the date of the homicide], is it accurate to indicate that if there were three subjects who had gone to a residence, with guns, two of which were wearing red, two of which are seen in photographs throwing up a W, have photographs of other individuals throwing up the B, and have committed a crime together, would not those three individuals, would that not be for the purposes of your criteria, and for purposes of determination, that that crime was committed at the benefit of, at the direction of, or in association with the Blood criminal street gang on that date?" Again, Sergeant Couvillion responded, "Yes."

A

Sergeant Couvillion testified that Tyson wrote in a juvenile hall questionnaire about five years before the homicide in this case that he was a gang member. The questionnaire was not introduced as evidence, and Tyson did not identify a particular gang in his statement. Tyson did not object to this testimony, and Sergeant Couvillion relied on Tyson's statement, in part, to support his opinion that Tyson committed the crimes in this case for the benefit of the gang. Tyson now contends the testimony

constituted inadmissible hearsay. For this contention, he relies on a California Supreme Court case decided after trial in this case, *Sanchez, supra,* 63 Cal.4th 665. He also contends that the statement from the juvenile detention questionnaire was inadmissible under *People v. Elizalde* (2015) 61 Cal.4th 523 (*Elizalde*) because there was no evidence he was given his *Miranda* rights before being asked the potentially incriminating question about gang membership. (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].) We conclude that any error in admitting Sergeant Couvillion's testimony about the juvenile detention questionnaire was harmless.

In *Sanchez*, the California Supreme Court held: "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate testimonial hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez, supra,* 63 Cal.4th at p. 686, fn. & italics omitted.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id*. at p. 676.) Tyson argues Sergeant Couvillion's testimony concerning what Tyson wrote on a juvenile detention questionnaire was inadmissible hearsay.

In *Elizalde*, the California Supreme Court held *Miranda* protections apply to booking questions about a person's gang membership. (*Elizalde, supra,* 61 Cal.4th at pp. 538-540.) Here, there was no evidence Tyson was given *Miranda* warnings before he acknowledged gang membership on the juvenile detention questionnaire.

The Attorney General argues Tyson forfeited the *Sanchez* and *Elizalde* objections because they were not made in the trial court, even though *Sanchez* and *Elizalde* were

decided after trial in this case. We need not consider this forfeiture question because any error in admitting the evidence was harmless.

Sanchez error invokes the state standard for prejudice, i.e., whether it is reasonably probable Tyson would have obtained a more favorable result if the jury had not heard that he admitted unspecific gang membership as a juvenile five years before the homicide in this case. (See *People v. Roa* (2017) 11 Cal.App.5th 428, 455 [evidentiary error, such as under *Sanchez*, invokes state standard for prejudice under *People v. Watson* (1956) 46 Cal.2d 818].) Tyson acknowledges that the juvenile detention questionnaire was not testimonial (see *People v. Dungo* (2012) 55 Cal.4th 608, 619-621); therefore, *Sanchez* error did not invoke the federal standard for prejudice under *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710].

However, the federal standard applies to *Elizalde* error. "The erroneous admission of a defendant's statements obtained in violation of the Fifth Amendment is reviewed for prejudice under the beyond a reasonable doubt standard . . . ." (*Elizalde*, *supra*, 61 Cal.4th at p. 542.) But when the gang circumstances are amply established by independent and uncontradicted evidence, the erroneous admission of challenged statements is harmless beyond a reasonable doubt. (*Ibid*.)

Under either standard, admission of Tyson's written acknowledgement of gang membership in the juvenile detention questionnaire five years before the crimes in this case was harmless. Tyson argues that, without the admission of gang membership in the juvenile detention questionnaire, Sergeant Couvillion would have had no foundation upon which to base his expert opinion that Tyson committed the crimes for the benefit of a gang under section 186.22, subdivision (b) or was a member of the West Side Bloods gang under section 186.22, subdivision (a). But Tyson overstates the importance of the juvenile detention questionnaire to Sergeant Couvillion's expert opinion. While Sergeant Couvillion mentioned the juvenile detention questionnaire, he focused on the overall circumstances of the crimes to conclude that the crimes were committed for the benefit of

the gang. The robbery was done for profit. It went bad and turned into a homicide. Tyson and a co-perpetrator wore red hats. Tyson's co-perpetrators had claimed gang membership. The perpetrators referred to each other the way gang members refer to each other. And this type of crime is used to promote one's gang. Viewing the totality of the evidence and Sergeant Couvillion's testimony, admission of the statement in the juvenile detention questionnaire was harmless beyond a reasonable doubt and, therefore, also harmless under the less-rigorous state standard.[2]

B

Defendants contend Sergeant Couvillion's testimony that Anthony Copeland and Chamnan Sath were gang members and committed predicate offenses was hearsay under *Sanchez*, *supra*, 63 Cal.4th 665 and should have been excluded. The contention is without merit because Sergeant Couvillion's testimony that Copeland and Sath were gang members was not hearsay. Furthermore, even though Sergeant Couvillion's testimony concerning crimes committed by Copeland and Sath appears to have been based on his review of their rap sheets, that hearsay is not of the type prohibited by *Sanchez*.

Sergeant Couvillion testified that Anthony Copeland is a documented Bloods gang member and that he is a member of the West Side Bloods set who committed burglary, conspiracy to commit a crime, and transporting a firearm and controlled substances. Sergeant Couvillion further testified that Chamnan Sath was an Original Bloods member who was convicted of robbery with gang enhancements. Sergeant Couvillion did not

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[2] Appellate counsel for Tyson filed a request to expand her appointment to include preparation and filing of a petition for writ of habeas corpus. Decision on the request was deferred pending the filing of this opinion. The petition asserts that Sergeant Couvillion gave materially false testimony because Tyson's juvenile detention questionnaire asked whether he "claim[ed] any gang affiliation," not whether he was a gang member. The request to expand counsel's appointment is denied because, on the face of the request, there is no materially false testimony shown.

purport to rely on information other than his own knowledge when saying that Copeland and Sath are gang members, but he referred to rap sheets to detail their convictions.

Defendants argue there was no foundation laid for Sergeant Couvillion's knowledge that Copeland and Sath were gang members. We disagree. Sergeant Couvillion cited personal knowledge of their gang membership. If the defense felt that was insufficient, defendants could have made an objection based on lack of foundation. Nevertheless, defendants argue, as to Sath: "Since the prosecution offered no foundation that Sgt. Couvillion's familiarity with Sath was based on personal knowledge, his testimony that he 'knew' Sath 'to be an original Blood' was hearsay." For this proposition, defendants cite *Sanchez, supra*, 63 Cal.4th 665, but *Sanchez* is inapposite on this point. Sergeant Couvillion claimed personal knowledge, and there was no indication that his personal knowledge was based on hearsay. Therefore, the testimony that Copeland and Sath were gang members was not hearsay.

Concerning the reliance on the rap sheets to establish the predicate offenses, we conclude *Sanchez* does not prohibit hearsay used by an expert on this type of non-case-specific fact. "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra,* 63 Cal.4th at p. 676.) This court has held that expert testimony, including about predicate offenses, is not case-specific under *Sanchez*: "The predicate offenses used in this case do not fall within this definition [of case-specific facts]; they did not involve the particular events or participants involved in the case being tried. Rather, they are historical facts related to the gang's conduct and activities. These facts pertain to the gang as an organization and are not specific to the case being tried." (*People v. Blessett* (2018) 22 Cal.App.5th 903, 944-945, fn. omitted, review granted August 8, 2018, S249250.) Therefore, Sergeant Couvillion's testimony to establish the existence of a criminal street gang, including testimony concerning predicate offenses, did not relate case-specific hearsay in violation of *Sanchez*.

C

Defendants contend the trial court erred by allowing the prosecutor to ask and Sergeant Couvillion to answer two hypothetical questions.

An expert may properly express an opinion, based on hypothetical questions that track the evidence, as to whether the crime, if the jury found it in fact occurred, would have been for a gang purpose. (*People v. Vang* (2011) 52 Cal.4th 1038, 1048 (*Vang*).) Expert opinion that particular criminal conduct benefited a gang is not only permissible but can be sufficient to support a section 186.22, subdivision (b)(1) gang enhancement. (*Vang*, at p. 1048.)

" 'There is no hard and fast rule that the expert cannot be asked a question that coincides with the ultimate issue in the case.' [Citations.] ' "[T]he true rule is that admissibility depends on the nature of the issue and the circumstances of the case, there being a large element of judicial discretion involved . . . . Oftentimes an opinion may be received on a simple ultimate issue, even when it is the sole one, as for example where the issue is the value of an article, or the sanity of a person; because it cannot be further simplified and cannot be fully tried without hearing opinions from those in better position to form them than the jury can be placed in." ' " (*People v. Valdez* (1997) 58 Cal.App.4th 494, 507.)

The first challenged colloquy was as follows:

"Q. [I]n your expert opinion, is the felony conduct associated with the events of August the 25th of the year 2012 gang-related?

"A. Yes.

"Q. And what is the basis of your opinion?

"A. Based on the hypothetical you presented that the individuals, um, committed, uh, robbery;

"The robbery was for profit;

"The robbery went bad, um, turned into a homicide;

"The individuals involved, um, have claimed gang membership through writings, um, and past, uh, practices;

"They've referred to each other the way other gang members refer to each other;

"I believe that the gang members use this type of crime to further promote their gang, to instill fear in their community, and to work together to show trust amongst each other, knowing that gang members will always talk to other gang members and word will spread and they'll gain more respect from other gang members that they're able to commit crime.

"Q. And so when you take into consideration --

[Counsel for Tyson]: I'm going to object to the response, move to strike. The hypothetical underlying it as he indicated is insufficient, it's inappropriate.

"THE COURT: Overruled."

The second challenged colloquy was as follows:

"Q. And so if three individuals, um, two of which had previously identified themselves associated with some criminal street gangs, connect themselves with a third individual;

"Two of those individuals go to a location with firearms;

"Two of those locations -- two of those individuals are wearing red hats;

"And they go into the location, ultimately shooting and killing an individual;

"Do you take all of those factors into consideration associated with gang-related terminology, gang-related material possession, and gang-related, um, identities, a name associated with them to a gang, do you base an opinion upon those facts as to whether or not that crime would have been completed for the benefit of, at the direction of, or in association with a criminal street gang for the specific purpose of promoting, instigating and furthering criminal conduct by gang members?

"A. Yes.

"[Counsel for Tyson]: Objection, it's an improper question.

"THE COURT: Overruled."

The Attorney General argues defendants forfeited any issues concerning the hypothetical questions and answers because the trial objections were not adequate. Defendants respond that if the objections were inadequate, trial counsel provided constitutionally deficient representation. We need not decide whether the claims are forfeited because the trial court did not abuse its discretion in allowing the hypothetical questions and answers.

Concerning the first question, defendants assert (1) the question was not a hypothetical, (2) the question did not track the evidence, (3) Sergeant Couvillion said his answer was based on a hypothetical question but none was posed, (4) Sergeant Couvillion's answer was a "boilerplate explanation" not based on facts in evidence, and (5) Sergeant Couvillion's "central theme was . . . not in evidence."

1. While it is true that the prosecutor did not pose the question as a hypothetical ("is the felony conduct associated with the events of August the 25th of the year 2012 gang-related?"), Sergeant Couvillion answered as if it were a hypothetical question ("[b]ased on the hypothetical . . ."), listing the hypothetical elements he relied on in concluding in his expert opinion that the felony conduct was gang-related. "Hypothetical questions must not be prohibited solely because they track the evidence too closely, or because the questioner did not disguise the fact the questions were based on the evidence. (*Vang, supra,* 52 Cal.4th at p. 1051.) Under these circumstances in which the question was answered as a response to a hypothetical question, there was no abuse of discretion in admitting the evidence. The result was the same as if the question had been posed as a hypothetical question. Sergeant Couvillion listed the elements of a hypothetical and opined that it suggested gang-related conduct.

2. Defendants observe that a hypothetical question must track the evidence (*Vang, supra,* 52 Cal.4th at p. 1048) and assert that the question did not track the evidence because it was not hypothetical. As noted, however, the result was the same as if it had

been asked as a hypothetical question, and the response tracked the evidence. Defendants claim that even if answered as a hypothetical, the question was improper because it effectively asked whether there was a prohibited mental state. But it is proper for an expert to respond in hypothetical form regarding whether conduct is gang-related. (*Vang, supra,* 52 Cal.4th at p. 1048.)

3. Nevertheless, defendants suggest it was error for Sergeant Couvillion to respond to the prosecutor's question in terms of a hypothetical because a hypothetical question "was not in evidence." The argument lacks merit because questions are not evidence, and in any event, as we have indicated, Sergeant Couvillion's treatment of the question as a hypothetical was appropriate.

4. In addition, defendants claim the "boilerplate" answer Sergeant Couvillion gave was based on matters not in evidence. First, they fault the observation that "[t]he individuals involved . . . have claimed membership through writings . . . and past . . . practices." In this case, defendants had engaged in various acts indicating gang membership. Even Tyson, who had not previously been associated with gang membership aside from the inadmissible juvenile detention questionnaire, had been involved in at least one firearm transaction and was wearing a red hat with a "W" for West Side Bloods. These facts support the hypothetical. Second, defendants challenge the comment that defendant's "referred to each other the way other gang members refer to each other." Tyson's claim that there was no such evidence as to him is without merit. He referred to Scott as "Blood" in a text message. And third, defendants challenge the statement that "[t]he robbery was for profit" by arguing that all robberies are for profit in a broad sense. Even so, because robbery is an indicator of gang-related conduct, defendants have not established obvious error.

5. Defendants further claim there was no evidence supporting Sergeant Couvillion's premise that each defendant was a gang member. However, there was

evidence of gang membership, even by Tyson, who associated with gang members, engaged in a firearm transaction, and wore a red hat with a "W" for West Side Bloods.

As for the second hypothetical question, defendants contend the question was "largely unintelligible" and "[i]ts keywords were more matters not in evidence." As noted above, there was evidence to support the hypothetical, even as to Tyson who had not previously been identified as a gang member except through the inadmissible juvenile detention questionnaire. Tyson argues that wearing a red hat with a "W" was not relevant because the hypothetical "was not specific to any particular gang." But wearing colors and symbols used by gang members is an indicator of gang-related conduct regardless of whether the hypothetical question referred to a particular gang. And finally, defendants claim the second hypothetical question "omitted a wide variety of material information." This claim fails because the hypothetical explored Sergeant Couvillion's expert knowledge and he was subject to cross-examination regarding any alleged omissions. The hypothetical was not misleading.

V

Defendants make several contentions concerning the sufficiency of the evidence to sustain the convictions and true findings on the enhancement allegations.

"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) We "presume[] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

A

Defendants contend the evidence was insufficient to support the substantive gang offense and the gang enhancements in several ways.

1. Evidence of associational or organizational connection between the Bloods and its subsets.

Defendants contend the prosecution failed to introduce sufficient evidence of some associational or organizational connection between the Bloods and its subsets, West Side Bloods and Original Bloods. They argue that without evidence of this connection the evidence was insufficient to sustain the conviction on the substantive gang offense and the true findings on the gang enhancements under section 186.22.

An element of the substantive gang offense (§ 186.22, subd. (a)) is participation in a criminal street gang. And an element of the gang enhancement is commission of the offense for the "benefit" of or in "association with" a criminal street gang. (§ 186.22, subd. (b)(1).) These elements necessarily require proof of the existence of the criminal street gang, which involves evidence of three or more persons associating under a common name or insignia with a primary activity of committing at least one criminal act specified in the statute, and -- as is pertinent here -- evidence that members of this association engage (alone or together) in a pattern of criminal gang activity involving two or more of the specified predicate offenses. (*Prunty, supra*, 62 Cal.4th at pp. 71, 74; § 186.22, subds. (e) & (f).)

When the California Supreme Court decided *Prunty*, it concluded that "where the prosecution's case positing the existence of a single 'criminal street gang' for purposes of section 186.22[, subdivision] (f) turns on the existence and conduct of one or more gang subsets, then the prosecution must show some associational or organizational connection uniting those subsets." (*Prunty*, *supra*, 62 Cal.4th at p. 71.)

Prunty concluded evidence of common symbols, colors, enemies, and names are insufficient to show that a criminal street gang exists. (*Prunty, supra*, 62 Cal.4th at p. 72.) There must be proof of more than a mere "common ideology that appears to be present among otherwise disconnected people." (*Id*. at p. 76.) *Prunty* offered "illustrative examples" of how to prove disparate subsets are in fact connected such that

the actions of one can be attributed to another. (*Ibid*.) Even absent a formal hierarchy, different subsets can be connected if controlled by the same "hub" entity through leaders in the subset who answer to it, if the subsets provide financial support to it, or if they are subject to similar rules of conduct that the larger organization prescribes. (*Id*. at p. 77.) Acting in concert with other subsets, professing loyalty to one another, intermingling socially, expressly recognizing mutual affiliation, or having interchangeable membership also permits a rational inference of at least an informal connection. (*Id*. at pp. 77-79.) Since *Prunty*, judgments have been affirmed in several cases involving substantive gang offenses or gang enhancements that were tried before the California Supreme Court decided *Prunty*. (See *People v. Miranda* (2016) 2 Cal.App.5th 829, 841-842; *People v. Vasquez* (2016) 247 Cal.App.4th 909, 924-926; *People v. Ewing* (2016) 244 Cal.App.4th 359, 372, 374-376 (*Ewing*).)

Here, there was evidence of an associational or organizational connection between the West Side Bloods and the Original Bloods. Sergeant Couvillion testified that they were the same gang in Stockton. This unity is sufficient to establish a connection, even if other aspects of the relationship between the name "West Side Bloods" and the name "Original Bloods" were not explored. (See *Prunty, supra*, 62 Cal.4th at pp. 77-79.) Unlike in *Prunty*, the subsets of the Bloods gang in this case were not only connected but were the same gang, and thus there was no need to show that the West Side Bloods and Original Bloods were connected through their common relationship with the Bloods gang.

Furthermore, the associational or organizational connection between the Bloods gang and the subset West Side Bloods/Original Bloods gang can be inferred from the testimony concerning the relationship between the umbrella Bloods gang and its subset West Side Bloods/Original Bloods. Evidence of a "loosely hierarchical organization" is sufficient to establish an associational or organizational connection. (*Prunty, supra*, 62 Cal.4th at p. 71.) In this case, Sergeant Couvillion testified that, in Stockton, the West

Side Bloods/Original Bloods gang is a subset of the Bloods gang. They all -- both West Side Bloods/Original Bloods gang members and others who Sergeant Couvillion referred to as "straight Bloods," not affiliated with a subset -- wear red and make Bloods gang signs. The hierarchical connection between the Bloods gang and the West Side Bloods/Original Bloods subset is further supported by Mitchell's graffiti in his armoire or television stand reflecting Bloods terms, such as "woop," "Blood," and West Side Bloods references.

Sergeant Couvillion's testimony was sufficient to establish the West Side Bloods/Original Bloods gang engaged in a pattern of criminal activity which included predicate offenses under section 186.22, subdivision (f). He testified that Anthony Copeland was a West Side Bloods and a Bloods gang member who was convicted of burglary, conspiracy to commit a crime, and transporting a firearm and controlled substances, and Chamnan Sath was an Original Bloods member who was convicted of robbery with gang enhancements.

However, defendants contend there was no evidence Copeland and Sath committed the predicate offenses when they were gang members. This contention is without merit because the statute does not require that the persons committing the predicate offenses must be gang members when the offenses were committed. (*People v. Augborne* (2002) 104 Cal.App.4th 362, 375.) And *Prunty* did not address or modify this holding.

Sergeant Couvillion's testimony was also sufficient to establish the primary activities element of the gang definition under section 186.22, subdivision (f). He testified that the primary activities of the Bloods gang include murder, drive-by shootings, weapon offenses, burglary, auto theft, drug sales, and robberies. While he did not say that these were the primary activities of the West Side Bloods/Original Bloods subset, there is no need to establish that a gang and its established subset have the same primary activities because the nature of a subset is that it is part of the umbrella gang.

Sergeant Couvillion's testimony concerning the primary activities of Bloods gang members was sufficient to establish the primary activities of the West Side Bloods/Original Bloods subset in Stockton.

2. Evidence that the robbery was committed to benefit the gang.

Defendants contends that, for the purpose of proving the gang enhancement under section 186.22, subdivision (b), there was insufficient evidence that robbery was committed to benefit the gang. They claim Sergeant Couvillion's expert testimony that the crimes were committed to benefit the gang, in particular his responses to the hypothetical questions, was speculative and unsupported by evidence. However, even without Sergeant Couvillion's responses to the hypothetical questions, the evidence was sufficient. The purpose of the robbery was to obtain a firearm, which is an important part of gang culture. Two defendants wore gang-related hats, which would signal to others that the crime was being committed on behalf of the gang. Those circumstances were sufficient evidence that the robbery was committed to benefit the gang.

3. Evidence defendants were members of the same gang.

Defendants contend that, for the purpose of proving the substantive gang offense, there was insufficient evidence that they were members of the same gang. To support a conviction on the substantive gang offense under section 186.22, subdivision (a), the defendant must have acted with another member of that defendant's gang. (*Velasco, supra,* 235 Cal.App.4th at p. 78.) "It is not sufficient that the defendant act with a member of another gang, unless it is shown that those gangs are merely subsets of a primary gang and typically work together." (*Ibid.*)

Here, there was sufficient evidence to support a finding that defendants Mitchell and Scott were members of the West Side Bloods gang. (Tyson was not convicted of the substantive gang offense.) Mitchell claimed membership in the West Side Bloods gang with his graffiti, pictures of people giving the "W" hand sign, and threats that the area was "West Side." He also referred to himself as "Dre Blood" or "Dre Woop." These

circumstances, along with many others we need not list, were sufficient to conclude Mitchell was a West Side Bloods gang member.

Scott used language, such as replacing "c" with "ck", that indicated his allegiance to the Bloods gang. He associated with Mitchell and committed the crimes in this case with Mitchell. He referred to Mitchell as "Dre Blood," and had other contacts on his cell phone referred to as "Blood." In a text message, Mitchell encouraged Scott to "[s]tay loyal." Scott was shown making "W" hand signs and wearing a hat with red lettering in a picture discovered on his cell phone. These circumstances were sufficient to conclude Scott was a West Side Bloods gang member, even though there were also indications he belonged to an unassociated gang in Oakland.

Because there was sufficient evidence that defendants Mitchell and Scott were West Side Bloods gang members, there was evidence each acted with another member of his own gang, thus supporting the conviction on the substantive gang offense under section 186.22, subdivision (a).

B

Defendants contend the evidence was insufficient to sustain their robbery convictions because they did not form the intent to take the shotgun until after Mitchell shot Holladay.

To prove robbery, the prosecution must prove, among other things, defendants used force or fear to take the property or to prevent the person from resisting, and defendants formed the intent to take the property at least during the time they used force or fear. (CALCRIM No. 1600.) As we noted in our discussion concerning defendants' contention that the trial court erred by not instructing concerning theft, Holladay was still alive when defendants took the shotgun, and defendants continued to apply force or fear as they fled, brandishing the shotgun. The evidence was sufficient to sustain a conviction for robbery -- a taking by force or fear.

C

Defendants next contend the evidence was insufficient to sustain their convictions for first degree murder under the two theories presented to the juries: premeditated murder and felony murder.

A murder perpetrated in the commission of robbery is first degree felony murder. (§ 189, subd. (a).) Defendants assert the evidence was insufficient because it did not support a conviction for robbery. We have already rejected that assertion. Therefore, the evidence was sufficient to sustain a conviction of first degree felony murder.

If alternative legal theories of liability are presented to the jury, and the evidence is sufficient to support one but not another, the insufficiency as to one alternative "does not provide an independent basis for reversing an otherwise valid conviction." (*Griffin v. United States* (1991) 502 U.S. 46, 60 [116 L.Ed.2d 371, 383].) Therefore, because the evidence supported the felony murder theory of first degree murder, defendants' contention is without merit.

D

Defendants further contend the evidence was insufficient to support the true finding on the personal use firearm enhancement under section 12022.53, subdivision (d) because, in their view, the angle at which Holladay was shot made it unlikely the shooting was intentional.

Section 12022.53, subdivision (d) provides for an additional term of 25 years to life for a defendant who "personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice. . . ."

Holladay was killed by one shotgun blast from about five feet away. The pellets and shot cup entered the bottom half of Holladay's scrotum, and the pellets traveled upward from front to the back of his body, severing an iliac artery. Scott argues: "The entry point, angle and direction of the shotgun blast make it difficult to conceive of any

scenario that even might theoretically have come from intentional discharge -- let alone one supported by logical inference, as required for substantial evidence."

We disagree. Various possible scenarios can be inferred from these facts. Mitchell could have shoved Holladay down into a supine position and then shot at Holladay while Holladay scrambled backward to evade the blast; or Holladay may have fallen backwards when Mitchell fired the shotgun. In any event, the evidence of an intentional shooting is substantial. Mitchell shot Holladay, the object of the robbery and the person who said "be cool, be cool," but Mitchell did not shoot anyone else and he did not miss everyone.

Scott observes that the medical expert said there could have been a struggle over the shotgun, resulting in discharge of the weapon. However, the possibility that there was a struggle over the shotgun and the discharge was accidental does not overcome the substantial evidence of an intentional discharge when we are tasked with construing the evidence in the light most favorable to the judgment.

VI

Mitchell argues the trial court erred by failing to conduct an investigation into possible intimidation among the jurors. The argument applies only to Mitchell because he had a separate jury.

After one day of jury deliberations, the jury foreperson sent a note to the trial court: "We have verdicts on some but are deadlocked on one count. We are also deadlocked on some enhancements." The next day, the foreperson sent another note to the trial court: "One juror has admitted to us that she had a relative murdered, I think she said about 3 years ago, due to a stabbing. She stated that she did not state this on her juror questionnaire nor during juror questioning. She became visibly upset and left the deliberations crying at one point."

The trial court invited the foreperson into chambers with counsel and inquired concerning the note. The foreperson said Juror No. 9, the only female African-American

on the jury, shared with the jury that her stepson was stabbed in the groin and died. Juror No. 9 seemed upset the perpetrator of that crime was sentenced only to three years. Shortly after telling the other jurors about her stepson, Juror No. 9 left the jury room, crying. The foreperson did not believe Juror No. 9 was biased against Mitchell. Instead, it was the opposite. The foreperson did not think the revelation about the stepson had an impact on deliberations.

When questioned by the trial court, Juror No. 9 said her revelation about her stepson, who was killed in a domestic violence incident, came about in the context of a jury discussion concerning the credibility of one of the witnesses. Juror No. 9 told the trial court that she did not agree with the credibility determination of the rest of the jury and that she had a right to disagree. She maintained that her disagreement with the rest of the jury had nothing to do with what happened to her stepson. But she engaged in all of the conversations. She said that, while the rest of the jury was "lolly-gagging," she was quiet because she was trying to figure out what to do as a juror.

Juror No. 9 continued: "I've sat through everything. It's just my -- my verdict -- not "verdict," but my decision, excuse me, was not the same as everyone else's, and they questioned. They questioned it and I answered it. That's why I'm sitting here. Because one of them came and said, 'Well, we don't know if that affects her.' [¶] Trust me, I have been through a lot. That -- that does not sway my decision. It's what I feel. And even sitting here with you, it doesn't change. I questioned his or her credibility. I do."

Juror No. 9 said she regretted telling them why she questioned the witness's credibility, apparently referring to her statement about her stepson's death. She said: "But I made the mistake of giving them why. Because I felt intimidated. [Bec]ause they're continuously trying to get me to see 'Well, the' -- that's why we have all these different things to read. [Bec]ause I want to read it [apparently referring to the jury's review of witness testimony]."

After Juror No. 9 was excused from chambers, counsel for Mitchell said that it sounded like a group of jurors was putting undue pressure on Juror No. 9. But defense counsel and the prosecutor did not have an objection to Juror No. 9 continuing as a juror. Counsel for Mitchell moved for mistrial based on inappropriate discussions of sentencing by the jury. He added: "I think that we should do more to find out what's going on in terms of pressuring. [¶] It sounds like to me she seemed -- when she came in here -- . . . a little browbeaten, frankly. . . . She seemed like somebody who was being picked on." The prosecutor disagreed, saying "the demeanor of the [juror] was very steadfast, it was very strong, her language was very purposeful. Her demeanor was . . . sincere . . . in her position and articulation. . . . [S]he is not a weak individual. She was not cowering as she sat here. In fact, her facial expressions were very strong and adamant in the strength of her own conviction, and her position." The trial court agreed with the prosecutor's statement, saying it described what the trial court saw by way of the juror's demeanor and response. The trial court denied the mistrial motion and decided not to poll the jurors further.

"[J]urors, without committing misconduct, may disagree during deliberations and may express themselves vigorously and even harshly: '[J]urors can be expected to disagree, even vehemently, and to attempt to persuade disagreeing fellow jurors by strenuous and sometimes heated means.' [Citation.] During deliberations, expressions of 'frustration, temper, and strong conviction' may be anticipated but, in the interest of free expression in the jury room, such expressions normally should not draw the court into intrusive inquiries. [Citations.]" (*People v. Engelman* (2002) 28 Cal.4th 436, 446.)

A trial court has considerable discretion in determining whether to investigate possible juror misconduct. (*People v. Linton* (2013) 56 Cal.4th 1146, 1213.) Moreover, a trial court inquiry into what is happening in jury deliberations "should be as limited in scope as possible, to avoid intruding unnecessarily upon the sanctity of the jury's deliberations. The inquiry should focus upon the conduct of the jurors, rather than upon

the content of the deliberations. Additionally, the inquiry should cease once the court is satisfied that the juror at issue is participating in deliberations and has not expressed an intention to disregard the court's instructions or otherwise committed misconduct, and that no other proper ground for discharge exists." (*People v. Cleveland* (2001) 25 Cal.4th 466, 485.)

Here, the trial court conducted an inquiry, even if it was not as robust as Mitchell argues it should have been. The trial court listened to the foreperson and Juror No. 9 and determined that no further inquiry was needed. Juror No. 9 was still participating in deliberations and expressing her opinions. The trial court found she was strong and able to express her views, even under pressure. The trial court did not abuse its discretion.

VII

Defendants make several contentions relating to sentencing.

A

Defendants contend an unstayed, consecutive sentence for robbery was unauthorized under section 654 because there was no evidence they intended for Holladay to be killed.

A sentencing court may not impose an unstayed term for the underlying felony if a defendant is convicted of murder under the felony-murder rule. (*People v. Montes* (2014) 58 Cal.4th 809, 898.) However, if there is sufficient evidence for both a felony-murder theory and a premeditated-murder theory and there is no indication the jury relied only on the felony-murder theory, the trial court may impose an unstayed term for the underlying felony. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731.)

Defendants contend there was insufficient evidence to support a conviction for premeditated murder; therefore, the murder conviction is based on the felony-murder theory and imposition of an unstayed term for the robbery was contrary to law. But viewed in the light most favorable to the judgment, there is evidence sufficient to support convictions for premeditated murder.

First degree murder includes murder that is willful, deliberate, and premeditated. (§ 189.) " ' "Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance.' " (*People v. Casares* (2016) 62 Cal.4th 808, 824, disapproved on other grounds in *People v. Dalton* (2019) 7 Cal.5th 166, 214.) "To prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act." (§ 189, subd. (d).) "Premeditation and deliberation do not require an extended period of time, merely an opportunity for reflection." (*People v. Cook* (2006) 39 Cal.4th 566, 603.)

Defendants direct our attention to *People v. Anderson* (1968) 70 Cal.2d 15. In *Anderson,* the California Supreme Court identified "three factors commonly present in cases of premeditated murder: '(1) [F]acts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing -- what may be characterized as "planning" activity; (2) facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a "motive" to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of "a pre-existing reflection" and "careful thought and weighing of considerations" rather than "mere unconsidered or rash impulse hastily executed" [citation]; (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a "preconceived design" to take his victim's life in a particular way for a "reason" which the jury can reasonably infer from facts of type (1) or (2).' " (*People v. Koontz* (2002) 27 Cal.4th 1041, 1081, italics omitted.)

The evidence in this case would support findings of planning, motive, and manner. Defendants armed themselves and went to Holladay's home and Holladay's room together, which would support a finding of planning. They intended to rob Holladay, and

killing him would further that plan, which would support a finding of motive. Mitchell shot Holladay while Holladay begged him to be cool. And it is possible to infer that Mitchell shoved Holladay down into a supine position and then shot at Holladay from a short range while Holladay scrambled backward to evade the blast. Viewing the evidence in the light most favorable to the judgment, as we must (see *People v. Steele* (2002) 27 Cal.4th 1230, 1249), there is substantial evidence to support a premeditated-murder theory, and the trial court did not commit reversable error in imposing an unstayed, consecutive term for robbery.

B

Defendants assert the trial court erred by sentencing them to nine years for robbery in concert.

Section 211 proscribes robbery. Section 212.5, subdivision (a) provides that robbery in an inhabited dwelling is first degree robbery. And section 213, subdivision (a)(1)(A) provides that first degree robbery is punishable by imprisonment for three, six, or nine years "[i]f the defendant, voluntarily acting in concert with two or more other persons, commits the robbery within an inhabited dwelling house . . . ." Other robberies are punishable by imprisonment for three, four, or six years. (§ 213, subd. (a)(1)(B).)

Defendants argue they could not be sentenced to the longer term for robbery in concert because, even though defendants were charged with the in-concert allegation, the juries were not instructed about the allegation and were not asked to make a finding. Defendants argue the sentence must be reversed and the matter remanded for resentencing.

It is true that although defendants were charged with the in-concert allegations, the trial court did not instruct the juries on those allegations, and the verdict forms did not ask the juries to determine whether the in-concert allegations were true. The Mitchell jury found Mitchell guilty, according to the verdict form, of "1st Degree Residential Robbery . . . in violation of Penal Code section 211, as charged in Count Two of the

Information." Likewise, the Scott/Tyson jury found defendants Scott and Tyson guilty based on the same verdict form language. Nevertheless, the trial court sentenced defendants to the upper term of nine years for first degree robbery, which could be imposed only if the first degree robbery was committed in concert under section 213, subdivision (a)(1)(A).

Defendants argue this violated their Sixth Amendment right to a jury trial because the in-concert circumstance increased their punishment. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435, 455].) The Attorney General agrees. But defendants and the Attorney General disagree regarding the effect of the error. Defendants assert the error is structural and reversible per se, and we must reverse the sentence and remand for a lawful sentence. The Attorney General contends the error is subject to a harmless error analysis.

The failure to submit an element of a crime or a sentencing factor to the jury is subject to harmless error analysis (*Washington v. Recuenco* (2006) 548 U.S. 212, 219-220 [165 L.Ed.2d 466]) under the standard set forth in *Chapman v. California*, *supra*, 386 U.S. 18 [17 L.Ed.2d 705]. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [*Apprendi* error evaluated under *Chapman* standard]). We therefore undertake that harmless error analysis.

The allegations presented to the juries in this case, and the juries' findings, establish that the failure to submit the in-concert allegation to the juries was harmless beyond a reasonable doubt. The juries necessarily concluded that the three defendants acted together in committing the crimes. There was no evidence to suggest that one of the defendants committed murder and robbery but not the others.

Defendants attempt to dispute this conclusion by adding an inapplicable definition to "in concert." Referring to Black's Law Dictionary, they note that "concerted action" means "[a]n action that has been planned, arranged, and agreed on by parties acting together to further some scheme or cause . . . ." (Black's Law Dictionary (7th ed. 1999)

p. 283.) Contrary to defendants' suggestion, however, robbery in concert, as defined in CALCRIM No. 1601, which should have been given to the juries in this case, requires only that "the defendant voluntarily acted with two or more other people who also committed or aided and abetted the commission of the robbery." And CALCRIM No. 1601 further provides: "To prove the crime of robbery in concert, the People do not have to prove a prearranged plan or scheme to commit robbery." Thus, considering its verdicts, the juries undoubtedly would have found true the in-concert allegation if it had been presented to them.

The *Apprendi* error was harmless beyond a reasonable doubt.

C

The trial court sentenced each defendant to a consecutive 25-year-to-life term for the firearm discharge enhancement under section 12022.53, subdivision (d). Since sentencing, the Legislature has amended section 12022.53 allowing a sentencing court to strike or dismiss the enhancement in the interest of justice. (Stats. 2017, ch. 682, § 2 (Senate Bill No. 620) (2017-2018 Reg. Sess.), effective January 1, 2018; 12022.53, subd. (h).) Defendants contend we must remand for the trial court to exercise its newly enacted discretion.

In *People v. Woods* (2018) 19 Cal.App.5th 1080, this court decided that the amendments to the firearm enhancement statutes in Senate Bill No. 620 giving the trial court discretion to strike those enhancements is retroactively applicable to all cases not yet final. (*Id*. at p. 1090.) However, we need not remand if doing so would be futile. (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 (*Gutierrez*).)

The Attorney General argues, as to each defendant, that remand would be futile under *Gutierrez* because the trial court imposed the upper term on the robbery count and because of the egregious facts of this case. We disagree that remand is futile. While it is true that the trial court imposed the upper term for the robbery, it made no statement hinting about what it would have done if it knew it had discretion to strike or dismiss the

firearm enhancement, which added a consecutive 25 years to life to the sentence. Vacating the sentence and remanding for resentencing would give defendants and the prosecutor the opportunity to argue the merits of whether to strike the firearm enhancements and would give the trial court the opportunity to exercise its discretion in the first instance.

We express no opinion as to how the trial court should exercise its newly enacted discretion on remand. We only conclude that, under the circumstances of this case, the trial court should be provided the opportunity to exercise its discretion in the first instance. (See *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228 [noting it is generally appropriate to remand for resentencing when a court proceeded through sentencing erroneously believing it lacked discretion to act in a certain way].)

VIII

Defendants claim that even if individual errors were harmless, the cumulative effect of the errors caused prejudice. We do not find cumulative prejudicial error on this record.

IX

Defendants argue we must remand to the trial court to determine whether defendants were afforded sufficient opportunity to make a record of information relevant to their eventual youth offender parole hearing. (*People v. Franklin* (2016) 63 Cal.4th 261, 284 (*Franklin*).) The following chronological discussion provides additional background for our analysis:

On August 25, 2012, the date of the offenses, Tyson was 22 years old (born 4/25/1990), Mitchell was 18 years old (born 7/22/1994), and Scott was 17 years old (born 4/28/1995).

Effective January 1, 2014, Senate Bill No. 260 (2012-2013 Reg. Sess.) added, among other provisions, section 3051. (Stats. 2013, ch. 312, § 4; *Franklin, supra*, 63 Cal.4th at p. 276.) With certain exceptions not applicable here, former section 3051

provided an opportunity for an offender who was under 18 years of age at the time of the offense to be released on parole irrespective of the sentence imposed by the trial court by requiring the Board of Parole Hearings to conduct a "youth offender parole hearing" on a set schedule depending on the length of the prisoner's sentence. For example, for a sentence of 25 years to life, the hearing will be held during the 25th year of incarceration. (former § 3051, subd. (b)(3).)

On June 1, 2015, the trial court sentenced each of the defendants.

Effective January 1, 2016, the Legislature increased the age of qualification for a youth offender parole hearing from "under 18 years of age" at the time of the commission of the offense to "under 23 years of age." (Stats. 2015, ch. 471, § 1; *Franklin, supra,* 63 Cal.4th at p. 277.)

On May 26, 2016, the California Supreme Court decided *Franklin,* which held that section 3051's provision of a youth offender parole hearing mooted the juvenile defendant's constitutional challenge to his sentence of 50 years to life by providing "a meaningful opportunity for release during his 25th year of incarceration." (*Franklin, supra,* 63 Cal.App.4th at pp. 279-280.) However, to ensure that the youth offender parole hearing would provide the defendant with a meaningful opportunity for release, the *Franklin* court remanded the case to the trial court for the limited purpose of determining "whether [the defendant] was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Id.* at p. 284.) "Assembling such statements 'about the individual before the crime' is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away." (*Id.* at pp. 283-284.)

Effective January 1, 2018, the Legislature again increased the age of qualification, this time to "25 years of age or younger." (Stats. 2017, ch. 684, § 1.5.) Thus, section 3051 now provides for a youth offender parole hearing for "any prisoner who was 25

years of age or younger . . . at the time of his or her controlling offense." (§ 3051, subd. (a).)

Each of the defendants was under 25 years of age at the time of the offenses and will eventually be eligible for a youth offender parole hearing. While this supports remand for the limited purpose of determining "whether [the defendant] was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing" (*Franklin, supra,* 63 Cal.4th at p. 284) because defendants were sentenced before the California Supreme Court decided *Franklin*, the Attorney General contends that, with respect to Scott, remand is not proper. The Attorney General argues Scott was sentenced after section 3051 was enacted. While that is true, the California Supreme Court had not yet decided *Franklin*. It was *Franklin*, not section 3051, that gave youthful offenders the opportunity to make a record at the time of sentencing. "Prior to *Franklin* . . . there was no clear indication that a [youthful offender's] sentencing hearing would be the primary mechanism for creating the record of information required for a youth offender parole hearing 25 years in the future. *Franklin* made clear that the sentencing hearing has newfound import in providing the [youthful offender] with an opportunity to place on the record the kinds of information that 'will be relevant to the [parole board] as it fulfills its statutory obligations under sections 3051 and 4801.' " (*People v. Jones* (2017) 7 Cal.App.5th 787, 819, quoting *Franklin, supra,* 63 Cal.4th at p. 287.)

Accordingly, under *Franklin*, each defendant is entitled to remand to determine whether he was "afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Franklin, supra,* 63 Cal.4th at p. 284.) If the trial court concludes defendants did not have sufficient opportunity, defendants must be afforded that opportunity.

DISPOSITION

The convictions are affirmed.

As to each defendant, the sentence is vacated, and the matter is remanded to the trial court to consider exercising its discretion under section 12022.53, subdivision (h), and to resentence each defendant as appropriate.[3]

Also as to each defendant, the matter is remanded to determine whether he was "afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Franklin, supra,* 63 Cal.4th at p. 284.) If the trial court concludes a defendant did not have sufficient opportunity, the trial court is directed to follow the procedures outlined in *Franklin* at page 284, to ensure that defendant is afforded such opportunity.

Tyson's request to expand appointment of counsel to include preparation and filing of a petition for writ of habeas corpus is denied.

/S/
MAURO, J.

We concur:

/S/
ROBIE, Acting P. J.

/S/
HOCH, J.

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3 We note that, as to Tyson, the trial court imposed and stayed a 20-year term under section 12022.53, subdivision (c) on the robbery count. However, the jury found that allegation not true. On remand, the trial court cannot impose a term as to that allegation.